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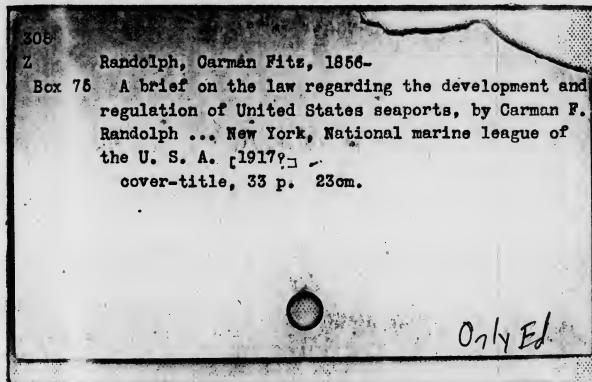
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**A BRIEF ON THE LAW
REGARDING THE DEVELOPMENT
AND REGULATION OF UNITED
STATES SEAPORTS**

BY

CARMAN F. RANDOLPH

OF THE NEW YORK BAR

PUBLISHED BY

THE NATIONAL MARINE LEAGUE OF THE U. S. A

1512 H ST., N. W., WASHINGTON, D. C.
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"Keep the Flag Flying"

The National Marine League of the U.S.A.

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To awaken the people of the United States, whether living on the seacoast or in the interior, to a full understanding of the necessity of re-establishing an American over-seas commercial marine, particularly for the expansion of our commerce with South America and Asia through the Panama Canal.

To formulate measures for this purpose from the standpoint of our national policy and development, and not from that of any special interest.

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BRIEF ON THE LAW REGARDING THE DEVELOPMENT AND REGULATION OF UNITED STATES SEAPORTS.

I.

To this generation it is a commonplace that the "more perfect union" sought by the Constitution of the United States was, through the fires of civil war, more than realized in a national solidarity. A commonplace to the next one will be that the great war pressed the nation far into the field of international politics and incidentally expanded its commercial opportunities.

Until the day of peace particularist commercial interests must be subordinated to the supreme military demands. National commercial interests, however, have never called for so intense a public concern as at this moment and for so forceful a backing by business men. For the Prussian "State," now pretending to forego its ambition to rule the world by its brutal arms and its infernal culture, is still striving to preserve its machinery for commercial conquest in the hope that a new era of "peaceful penetration" will permit a new and a successful assault.

Fully to develop our commercial opportunities a great merchant fleet is demanded, and this calls for a more efficient port system as a base of operations. Improvement of our seaport facilities is urgent, for the war has caused congestion at vital ports and accentuated the importance of a port system both as a factor in national offense and as an indispensable aid to foreign trade—at last come to its high place in our commercial life.

Development of national interest in the seaport as the place where the products of the interior are carried for ocean shipment will naturally involve a like interest in an American merchant marine that shall promote our safety, our prestige and our profit. Port improvement may not, indeed, directly advance American ships over others for its immediate effect is to facilitate commerce without special regard for the nationality of the carrying ships. Yet the very enlargement of commerce by American effort will beget a corresponding effort to secure for American ships a fair share of its carriage.

The National Marine League has retained me to prepare brief on our law and policy in regard to seaports. Not attempting to compass the varied details of a most complex subject, I shall endeavor broadly to indicate some of its leading points.

National in interest as well as in name, the League is well qualified to bring to port improvement the necessary national support to a cause too often exclusively promoted by parochial interests, each intent on its own affairs. In demonstrating the close connection between the American port and the American ship, the League will bring itself in closer touch with the important public and private interests centering in our ports and attract their valuable aid to its main objective—the American merchant fleet—its ships and seamen.

At the outbreak of the war, our merchant fleet was negligible in comparison with that of the foreign carriers.

To-day by government purchase, requisition and construction a great merchant fleet is being assembled for the urgency of war. How many of the ships will fly our flag after the war?—Shall they be publicly or pri-

vately operated?—The answers depend on our general law and policy in regard to shipping, and on this subject I am preparing another brief for the League.

Whatever the event the American port demands attention as a constant factor in marine transport, regardless of the carrier's flag. I mean by a "port" an area of water and land—harbor and shore—so affected by improvements and facilities of various kinds as to afford a convenient place for handling inbound and outbound maritime traffic. These improvements and facilities include such things as works for the protection and betterment of the harbor, a harbor fleet of tugs, lighters and pilot boats, wharves, docks, marine repair works, freight handling devices, warehouses and the terminals and interconnections of those inland transport lines by rail and water which assemble outgoing and distribute incoming cargoes.

What is the position of our seaports from a physical, and an economic viewpoint? How are they being developed and administered? How may we better them?

II.

SEAPORTS OF THE UNITED STATES

I shall not consider here the ports in our outlying possessions on and in the Pacific and the Caribbean, but I would point out that while the United States is not first in ownership of widely distributed ports and fuel stations it leads the world in the splendor of the metropolitan domain, in the potential efficiency of its metropolitan harbors.

How fortunate our location for world trade! A domain of three million square miles, the tenderloin of the Western Hemisphere—abounding in natural resources and traversed in part by great waterways. Its

seacoasts front both Europe and Asia and are studded with harbors which, generally, can be improved progressively at relatively less expense than most of our rival ports in Europe where greater tidal fluctuations in generally shallow waters impose a heavier first charge than nature lays upon ours. And all our ports are practically ice-free. Most of them, however, require dredging work to keep pace with their needs and a few the protective breakwater.

From an international standpoint the location of our ports is relatively satisfactory. None of our navigable rivers enters the sea in a foreign land. Their natural outlets are national outlets. Hence we are not vexed by such embarrassments as have long irritated nations on the upper reaches of rivers like the Rhine, the Danube, the Vistula—embarrassments likely to figure in the adjustment of international relations after the war.

Of our boundary waters the international problem of the Rio Grande is one rather of irrigation than of navigation. At the northwest corner the treaty of 1896 with Great Britain assures a mutually acceptable apportionment and use of the Strait of San Juan de Fuca and certain British rights of navigation in the Columbia River.

Considering the Great Lakes and St. Lawrence route to the sea we note our right, secured by the treaty of 1871, to free navigation of the river from our shore line to the sea. But the marked feature in our relation to the St. Lawrence is not a little used legal right on the river but a much used opportunity to divert by rail a great volume of Canadian exports from the river route to our own ports. While the St. Lawrence is the outlet of the Great Lakes on our northern frontier, while lake and river connection would, if actually navigable

from end to end, offer an unrivaled searoute from the heart of the continent, the way is vexed by cataract, rapids and seasonal ice. These obstructions have been measurably overcome by engineering skill and although man's cleverness cannot completely overcome them we must anticipate further progress. Meanwhile there is a great diversion of Canadian traffic to our ports. For example, it appears that of 310 million bushels of Canadian wheat shipped abroad in the year ending July 31, 1916, 161 million passed through our ports and earlier figures show that our preference is not a mere circumstance of war.

Portland, Maine, serves a substantial portion of Canadian general commerce by means of the Canadian-owned Grand Trunk Railway, but our own railways and the New York Barge Canal are the main channels drawing Canadian traffic through our ports.

Aware that Canada is striving to overcome the obstacles on the St. Lawrence route and to enlarge the function of Halifax as a railway port, we must not rest on our oars but maintain our railway, waterway and port system at high levels of efficiency. Also we are advised to manage our major ports with an eye to Canadian railway competition for the cross-continent carriage of European-Asiatic express traffic.

Railways play a mighty part in the development and operation of our ports. Even where waterways are heavy contributors to a port's operations, as at New York and New Orleans, the railway contribution predominates. Indeed a number of ports have been substantially created or stimulated by railroads seeking ocean outlets for inland products otherwise curtailed for lack of markets. The economic position of the port cannot be justly appraised or its scheme of government

wisely planned unless, to its ancient use as a resort for ships, we add its modern use as a railway terminal.

In a few of our ports—notably New Orleans and San Francisco—the waterfront is substantially under public ownership and control. Elsewhere a large share, and in some cases an almost exclusive share of the convenient waterfront is in private hands and is extensively utilized by railways for terminal purposes.

A seaport is some sense a terminal both for ships and railways, but this function is apt to be over-emphasized in discussion, with the consequence of diverting attention from its major and wider function. Of course, where the port is the nucleus of a great town it is the final destination of a heavy traffic in commodities for local consumption but, generally speaking, the port should be treated as a link rather than a terminus, a place of transhipment rather than of final destination.

The transportation lines connected by this link are privately owned ships on one side (I refer to normal, not to war conditions) and privately owned railways on the other. Each line serves interests far outreaching the distinctively local interests of the community established at the port. In short the port should be treated as one of the agencies in a single act of transport, say from Chicago to Liverpool, the others being the railway and ship. Having regard to its ultimate purpose the port is, therefore, rather a national and international utility than a local one but we shall see later why and how its development and administration should be largely inspired from within rather than from without.

The proper development, equipment and, to some extent, the governance of a port is appreciably conditioned

upon the character and volume of its traffic—understanding that volume, not value of freight is determinative, because it is volume which governs tonnage and its accommodation. For example New York with its ferries to Europe, and lines to all countries, its mass of incoming and outgoing miscellaneous and special freight, typifies the comprehensive service of a metropolitan port. Galveston typifies in cotton, Norfolk in coal, ports distinguished as outlets for particular commodities.

III.

THE PORT FROM THE STANDPOINT OF PUBLIC LAW

Considering the port from the standpoint of public law it is, as a whole and in respect of all particulars involving transportation, a "public use" for which property may be taken by the eminent domain.

When property is needed for distinctively governmental uses, such as improvement of navigation, light-houses, etc., etc., the eminent domain is employed by a public authority. When it is needed for such public services as may be entrusted to a company, the company may appropriate it. Thus, for instance, it is well settled that a railway company may condemn land for a wharf or a warehouse. (N. Y. C. & H. R. R., 77 N. Y. 249.)

A port, being a public use and performing a public service, is subject to regulation. And of all units within the sphere of regulation, the city port is the most complex. None offers so wide and varied a range to regulatory power. None calls for such acute discrimination in determining the seat, the method and the spirit of administration.

A great port, is—for war comes first in our thought—a vital point in our scheme of national offense and defense. The base of naval operations, of transport and supply for expeditionary forces and, as the great war blazons, a point where inadequate facilities are penalized by a dangerous congestion.

Alike in the emergency of war and the routine of peace the seaport serves a great variety of interests. In the first place it is an integral factor in a town which, commonly, owes its being and largely its expansion to the attraction of the harbor. Hence the port, on its local side, demands a substantial and in some respects a peculiar consideration from a municipal standpoint. In the second place the port as the terminus of inland transport is subject to regulation in the interest of state and interstate commerce. In all respects identified with the commercial life of the nation the port makes, in this respect, a special appeal to the producers of the interior by offering them a foreign outlet. In the third place the port is an officially designated place for the exit and entrance of foreign seaborne commerce—a sort of clearing house for personal and trade intercourse with foreign nations. This head covers such things as collection of customs, movement of ships and cargoes, supervision of immigration, etc.

Ports in the United States are constitutionally subject to state and federal powers. None may be a "free city" like Hamburg of old, or an *imperium in imperio* which seems to be in some measure the relation of Hamburg to-day to the German Empire.

Seeking a port administration that will harness federal, state and private interests, each pressing against the collar, we first broadly define state and federal jurisdiction.

IV.

STATE JURISDICTION

Every port of the United States, save those in our outlying possessions and the commercially negligible port at Washington, lies within a State of the Union. A few are located in state boundary waters—notably New York.

At the Revolution the original States assumed jurisdiction of tide waters and underlying land and they, together with all the States since admitted to the Union, possess this jurisdiction subject to rights vested by the Constitution in the federal government. (Martin v. Waddell, 16 Peters 367; Shively v. Bowlby, 118 U. S. 1.) Hence the States have undertaken to administer ports in all matters not exclusively within the federal province, such, for example, as the taxing of immigrants. (Henderson v. Wickham, 92 U. S. 269.)

In administering its ports a State commonly acts by its municipal corporations. Among this prevailing type are New York, Philadelphia, Galveston, Baltimore.

A type coming into vogue in this country is the "port authority"—a body independent of the municipal government and administering a port as an independent utility. Port authorities appointed by the state administer Boston, Portland, Maine, New Orleans, San Francisco. Authorities chosen by the electors in specially delimited districts administer Portland, Oregon, Seattle, Tampa.

Several states place their ports under the more or less intimate supervision of a state commission. The Massachusetts Board of Harbor and Land Commissioners

has certain supervisory powers over all ports except Boston. Similar boards have been instituted in Rhode Island and Connecticut. New Jersey has organized a state harbor commission which by a law of 1915 is absorbed by a Board of Commerce and Navigation.

Uncommon examples of new ports developed and equipped by railway enterprise and substantially managed as part of a railway system are Texas City and Port Arthur in Texas.

V.

FEDERAL JURISDICTION

National interest in our seaports is sometimes expressed in treaty provisions concerning their entrance and use by aliens as, for example, in obligations, usually reciprocal, in regard to immigration, foreign ships and seamen, etc.

Of interest in this relation is a specific obligation respecting ports embodied in Article 14 of a commercial treaty between Great Britain and Portugal August 12, 1914, ratified May 20, 1916. "In all that regards the stationing, loading and unloading of vessels in ports, docks, roadsteads or harbors, every privilege granted by either of the contracting parties to the vessels of any third country shall be extended immediately and unconditionally to the vessels of the other contracting party."

Federal interest in ports is constantly exemplified in harbor defense work.

Both treaty provisions and defense works bear on the commercial utility of the port but the power to

"regulate commerce among the several states and with foreign nations" is the main source of federal jurisdiction. This commerce power is so broad, so searching, so intolerant of state interference that it is safe to say that, in every relation of our ports to interstate and foreign intercourse, federal authority is supreme even though its exertion may preclude the state from what, otherwise, would be a proper regulation of local intercourse.

When Congress has undertaken or approved a particular harbor work a State cannot interfere with it. (*Wisconsin v. Duluth*, 96 U. S. 379.)

While a state may establish harbor lines—that is to say a limit on wharves and other erections—not incompatible with federal legislation (*Prosser v. North Pac. R.* 118 U. S. 80), the Secretary of War may be authorized to locate and relocate such lines without regard to state action. (*Philadelphia Co. v. Stimson* 223 U. S. 605.) And the mere location of a harbor line does not amount to a taking of private property within the line or its appropriation to public use. (*Willink v. U. S.*, 240 U. S. 572.)

While this brief will not discuss in detail what federal undertakings do and what do not impair private property rights, it bespeaks a much needed attention to the constitutional rule that private property shall not be taken for public use save on payment of "just compensation." This rule obtains of course in the construction of navigation works and the federal government is bound to pay for taking or injuring property—whether this be tangible or intangible—wharf or a franchise. (See *Monongahela Nav. Co. v. U. S.*, 148 U. S. 312.)

It is noteworthy that what is private property is, in this relation, defined by federal not by state standards

—following the rule that federal powers operate under their own principles of law, ignoring possibly different, possibly contrary state principles.

Before quitting the subject of private rights, I call attention to a proposition recently presented: "A great aid to the development of the ocean and river harbors of the country along broad lines would be an authoritative holding that the territory below the high water mark of our navigable waters—sea and lake and river—available or now in use as the sites of wharves and other port facilities really belong to the public *for such purposes*, and where so put to use by the public there is no right to compensation in the upland owner because of cutting off of access or other advantage due to adjacency to the water. . . . In my opinion both Congress and the legislature of any state could enter the field of the improvement of the water terminals by building and operating or licensing public wharves and like aids to navigation, with ample power to control the necessary premises below high water mark, so that it would not mean necessarily great expenditure of public moneys. . . . The claim of compensation will be made but if a man never had a thing he cannot say it is taken away. So far as actually improved property is concerned, any one would expect, and be granted, compensation for the value of the improvements found, taken over for use. The public is usually liberal."¹

The proposition, which, if not new, gains prominence by its presentation at this juncture requires fuller con-

¹ These citations are from an article in the Nautical Gazette Oct. 18, 1917 wherein Judge Robert M. Morgan of the Ohio Bar has amplified an address made to the American Association of Port Authorities at Cleveland Sept. 1917.

sideration than can be given in this general brief, so I cite it without comment.

Federal agencies dealing with such broad subjects as the revenue, ships and seamen, etc., etc., affect our seaports in many respects but it is sufficient for present purposes to mark several agencies peculiarly concerned in the development and regulation of port facilities.

Dealing with waterways in the United States Congress has, in virtue of the commerce power, appropriated, first and last, for the improvement of river and harbor navigation a vast sum of money of which a substantial portion has been spent in and about our seaports.

The money is spent by the War Department and under the supervision of a board of Army Engineers which is immediately responsible for the plan and execution of the works.

There is a growing appreciation of the admirable service of the Engineers but the service is handicapped, not so much by an unreasonable paucity of aggregate funds as by their improvident apportionment. Too often urgent works of magnitude suffer not only delay but deterioration through a niggardly dribbling of funds while a large sum is scattered every year among relatively unimportant, sometimes scandalously petty works.

The "log-rolling" factor in river and harbor appropriation bills is produced by political conditions quite comprehensible, perhaps not altogether unreasonable, but its too common exaggeration is a serious drawback to the interests of the country at large. A sign of improvement is a wholesome tendency, not yet sufficiently crystallized into custom, toward conditioning appro-

priations for specific harbor works upon the promise of the local community to make certain complementary port improvements at its own cost.

As the first step toward reforming the appropriation system, let the Federal Government broadly classify our ports according to their actual and potential importance. Classification should suggest a comprehensive and farsighted scheme for improvements and appropriations—a scheme based on the strategic and commercial rank and requirements of the respective ports and taking account of the disposition of the local community in respect of initiative and co-operation, etc., etc. A sound classification should inevitably lead up to the adoption of a genuine budget system for river and harbor appropriations and so minimize haphazard and log-rolling treatment.

We need not typify the familiar works undertaken by the War Department in aid of navigation but a recent instance illustrates the sweep of jurisdiction. Congress has by Act of March 3, 1909, lawfully authorized the Department to condemn the fee simple absolute of lands north of St. Mary's Ship Canal lying between the canal and the international boundary line at Sault Sainte Marie in Michigan; and the United States may proceed with such public works thereon as have been authorized for "uses of navigation." (See *Chandler-Dunbar Co. v. U. S.*, 229 U. S. 53.)

The Interstate Commerce Commission is a powerful factor in port development and regulation because of its jurisdiction of railway rates and terminal charges.

As an illustration, sufficient for present purposes, of the Commission's influence on port affairs we mark its delimitation of a metropolitan freight rate zone center-

ing on New York and including Jersey City, Newark, Paterson, Elizabeth, etc. Inbound railway rates to any point within this zone are identical—that is to say a ton of steel from Pittsburgh to Jersey City pays the same rate as a ton to New York, across the river, though the railway company pays the lighterage. The Commission has lately been petitioned to break up the zone and lessen the rate to New Jersey points by the lighterage charge to New York. New York protested that this would "split the port" to the economic disadvantage of the great metropolitan district. The matter was referred to an examiner who has made a tentative report dismissing the complaint.

It is too early to say just what influence the Shipping Board created by act of September 7, 1916, will have on distinctively port affairs, but the newcomer is obviously in a position to help or to hinder.

VI.

DIVIDED JURISDICTION

The relation between the Federal Government and the several States is such that there can be no conflict of jurisdiction between them. The solution of any jurisdictional controversy is the attribution of the subject matter to one or the other.

There is, however, a class of subjects of commercial interest, whereon, by the inaction or the permission of the Federal Government, the states may act so long as the former refrains from assuming control. Under this head several subjects are under what may be called a divided jurisdiction—each party regulating a part of the whole until such time as the Federal Government shall decide to oust the state's jurisdiction by asserting its own.

Divided jurisdiction appears in the regulation of pilotage and quarantine.

When the Federal Government was instituted it found state pilotage systems in operation and the shipping act of 1789 briefly confirmed these "until further provision is made by Congress" (*Gibbons v. Ogden*, 9 *Wheaton* 207). This early policy has been so far continued that a state may license pilots, make pilotage either compulsory or voluntary and fix the rates for service. (See *Olsen v. Smith*, 195 U. S. 344; *Anderson v. S. S. Co.*, 225 U. S. 187.) However, Congress has properly concerned itself with the qualifications of pilots by allowing a state to license only those applicants who have passed a federal examination, thus assuring a single standard of competency and Congress may at any time substitute a single federal pilotage system for those now maintained by states.

So long as federal qualifications for pilots are maintained it would seem that pilotage fees may be safely left to the states on the theory that none will drive ships to rival ports by exorbitant charges.

It may, however, be worth considering whether Federal authorities should not intervene in case really exorbitant charges are imposed at ports which have become, in fact, ports of necessity for certain kinds of traffic.

It is noteworthy that in 1913 Great Britain enacted a general Pilotage Act subjecting all pilots in the United Kingdom to certain uniform regulations.

Quarantine at our seaports is regulated both by state and federal laws. "But it may be conceded," says the Supreme Court, "that whenever Congress shall undertake to provide for the commercial cities of the United States a general system of quarantine, or shall confide

the execution of the details of such a system to a National Board of Health or to local boards as may be expedient, all state laws on the subject will be abrogated, at least so far as the two are inconsistent. But until this is done the laws of the state on the subject are valid." (*Morgan S. S. Co. v. Louisiana*, 118 U. S. 155.)

The Federal Government should take over the quarantine service not only at our ports, but, so far as it bears on intercourse among the states, throughout the country.

VII.

THE NEW YORK AND NEW JERSEY PORT COMMISSION

The States of New York and New Jersey have by similar statutes of 1917, authorized a joint commission to investigate conditions at the port of New York, to recommend a proper policy for the "entire port" with appropriate federal and state legislation—all looking to a port "efficiently organized and furnished with modern methods of piers, rail and water and freight facilities and adequately protected in the event of war."

The "entire port" comprises the body of water (with appurtenant land) lying westward of a line drawn from Sandy Hook to Coney Island, embracing such bays, passages and parts of tributary rivers as should for the sake of efficiency be administered as a commercial unit.

This port is the foundation of a market at the moment foremost in the world. To keep the lead its facilities must be enlarged, its governance improved.

The effort to this end should originate in the port community and enlist the hearty co-operation of the states immediately concerned—New York and New Jersey—the good will of neighbor States and the active support of the nation acting through the Federal Government.

The peculiar national interest in this, our premier port should be broadly demonstrated by emphasizing both its strategic and its commercial importance to the country.

The Federal Government has taken over the control of the "entire port" during the war. The Commission, aiding the Government in its task, is working as well for permanent results as for war needs. For war control should not only improve the physical condition of the port by betterments of various sorts, but demonstrate so great an advantage in the rule of a single authority, that when peace comes this will naturally follow — of course under a normal and a milder régime.

It will be a difficult but not an impossible task to create for a district, covering in New York at least the metropolis and in New Jersey a great number of communities ranging from petty towns to large cities, a practicable régime for developing, regulating and financing the great port.

Inspired by a truly imperial vision of New York's potentialities and mindful that only a port whose facilities are always a bit ahead of its traffic can attract a steadily increasing trade, may the Commission present a concrete and convincing illustration of how federal, state, municipal and private port interests may be lawfully and efficiently co-ordinated in port administration.

The task imposed on the Commission is too important for cursory treatment and too intricate for extended consideration in this general brief which touches, however, some of the broader problems the Commission will take up in detail. But, besides expressing the hope that at last our metropolitan port is to be put in the way of

larger service and that the Commission's recommendations will stimulate port improvement generally, I call attention to the railway terminal problem as one of primary importance. In fact, money spent to enlarge the accommodation for ships will be literally cast into the sea unless equivalent accommodation be made for assembling and distributing cargoes.

In this relation I note that the American Association of Port Authorities, at its annual meeting held in Montreal September 13-15, 1916, resolved to request the Interstate Commerce Commission to inquire into the matter of the separation of rail and terminal accounting, and to investigate the whole matter of terminal accommodation and terminal charges in their relation to the cost of handling cargoes at our ports. In a preamble the Association asserted that railway management of water terminals at the Atlantic ports of the United States does not, generally speaking, provide adequate connection and transfers, puts "competitive ends before the public need" and it declared that unless the companies improve the service the public must, with due regard to the equities involved, provide for the ownership and operation of terminals if necessary. The subject was discussed at the meeting held in Cleveland in September last but final report was deferred to the next annual meeting.

I also cite a paragraph from a statement by the Conference Committee on National Preparedness, October 12: "The exigencies of war may force Government ownership in the surprisingly near future. Perhaps the only step that the railroad people could take to postpone this for any length of time would be a very broad-minded and generous attitude on their part in contributing their facilities to the community service—

(under conditions of sale or lease, or perhaps pooling), where such facilities were needed to develop transportation facilities, which in the past would have been considered competitive to the individual railroad."

"Thus, if in New York Harbor, for instance, all the water front railroad property could be pooled under some logical and fair financial arrangement so that it could be used to develop sound, river and ocean traffic with proper railroad connection, no one can deny what an advantage it would be both to New York City and to the nation."

Railway ownership of extensive water terminals, especially on the Jersey shore, makes the port of New York the center of interest in the problem of the railway and the port. Advised that the Joint Commission's recommendations may powerfully direct public policy not only at New York, but elsewhere, believing that the Commission is without prepossession or prejudice but is eager to harmonize public and private interests if the way be shown the railway companies are pressed to show the way.

Mr. Hill's warnings in regard to terminal problems are becoming acute, if not dangerous realities. Rightly estimating the vital relation of port terminals to the vast stretches of our railway system the companies should, by presenting an acceptable port plan, go far toward suggesting a fair solution of the whole railway problem.

IX.

FREE PORTS

A "free port" is an enclosed and guarded area delimited within or adjacent to a general port in a country fenced by a protective tariff. Into this enclosure

foreign commodities may be brought without paying duty.

A free port may be designated and equipped as a storehouse, a factory, a market. A storehouse—where imports may await transhipment to a given country or a favorable market in any country: A factory—where raw, or partly finished products may by domestic labor, and perhaps by the addition of domestic material, be worked into finished products: A market—where foreign imports either in original or in finished shape may be inspected and sold.

Foreign commodities brought into a free port pay storage and other charges incident to their stay. If finally they enter the adjacent territory they pay the regular customs duties which, in the case of foreign products improved by domestic labor or material, are calculated upon the quantity or value of the foreign element.

Free ports, once not uncommon in European states, are now exceptional. The bonded warehouse has succeeded them as a partial substitute. Copenhagen and the great port of Hamburg, however, are among the few maintaining free port enclosures.

The free port of Hamburg embraces the larger and better part of the general port district. Great warehouses are all controlled by a company aided by the state under an arrangement which will ultimately bring them into public ownership. A number of workshops are located in the free port including two great shipyards and some establishments for working up foreign products. In addition to the general free port a free zone is devoted to the petroleum trade.

There is a movement looking to the revival of free

ports in France and advocates of the system lately presented to the Presidents of the Chambers of Commerce this argument: "In permitting foreign products to be freely imported, added to and mingled with our own products, subject to the application of the law against fraud, and thus to present the latter in conditions and forms which attract the greatest number of foreign customers, the free port system would increase both the inbound and outbound traffic of the port, contribute largely to the development of our merchant marine and draw to our doors the great currents of navigation." (*Revue des Deux Mondes*, July 1, 1917, p. 95.)

Significant for its spirit rather than its actual magnitude is the formal proposal that the upper Rhine from Geneva to Lyons be made navigable for 600 ton barges and that Switzerland be accommodated with free zones at the ports of Lyons and Marseilles so that a Swiss merchant fleet may engage in world trade. (N. Y. Journal of Commerce, Oct. 19, 1917.)

The United States has never established free ports, but the Tariff Commission is now investigating the subject with a view to recommending them.

The clause in article 1 section 9 of the constitution: "No preference shall be given by any regulation of commerce or revenue to the ports of one state over those of another," does not, in my opinion, forbid Congress to authorize or establish free ports according to a rational theory of classification. A free port need no more involve a "preference" than does a bonded warehouse.

IX. FOREIGN SEAPORTS

As each of our seaports finds in the competition of its fellows an incentive to improvement so each and all

should appreciate a further incentive in the competition of foreign ports for that considerable share of world traffic which flows to the more hospitable seagate. Furthermore, in taking account of this competition we shall, as a people, gain that broader vision of foreign trade which alone will bring to the improvement of our port system a truly national concern.

Among the factors in foreign intercourse none is more conspicuously persuasive than the model seagate, and so, despite the war, stimulated indeed by its warnings, our competitors are striving to improve their ports. We must follow suit. The purpose of this brief does not exact a comprehensive account of foreign ports. A selection of fact and law will suffice.

Viewing the major ports in the British Isles we mark first how strongly a physical embarrassment has directed the lines of their development.

At these ports, and also, at those on the Atlantic coast of Europe generally, the waterside wharf has, because of tidal fluctuations long proved unserviceable for the direct loading and discharging of cargo by the large vessels demanded by modern commerce. Hence the construction of docks or basins wherein ships, enter on a favoring tide, to discharge and load.

Docks in British ports are here and there controlled by private interests. For instance the railway port of Southampton; railway predominance at the Humber ports, notably Hull; and the great coal port of Cardiff controlled by the Bute family. But these private docks are subject to public regulation and in most of the great ports such as London, Liverpool, Glasgow, Manchester, Bristol, the docks are owned by public authorities.

Commending the broad study of British port administration as of peculiar significance in the development

of our own system, and emphasizing the fact that we there encounter no unduly centralized authority, no arbitrary uniformity and relatively little of that bureaucratic spirit which on the continent of Europe, so permeates the scheme of government, I select for brief examination the "Port of London Authority."

Prior to 1908, the administration of the port of London was distributed thus: The Thames Conservancy Board was empowered to maintain, improve and regulate navigation, prevent pollution, maintain free public moorings and grant licenses for erections below high-water mark. The Trinity House was charged with lighting and buoying the channel and with licensing pilots. The Waterman's Company licensed the lightermen. The Corporation of London afforded sanitary, police and fire protection. At this date the London docks (basins) were in private ownership, the London and India Docks Company controlling 480 acres of water and 1,000,000 feet of quay, out of a total of 640 acres and 146,000 feet.

The Port of London Act of December 21, 1908, revolutionized the government of the port both in form and range. The Act created a "port authority" comprising twenty-eight members: Elected, are seventeen by payers of dues, wharfingers and owners of rivercraft, and one by wharfingers: Appointed, are one by the admiralty; two by the Board of Trade (one a labor representative); four from the London County Council, two being members and two non-members (one a labor representative); two by the Corporation of London, one being a member, the other not; one by Trinity House.

The Act left riverside wharves, aggregating about 80,000 linear feet, in private hands, but authorized the port authority to acquire the undertakings of the great dock companies under purchasing powers reserved by

the state in their respective charters of incorporation. The docks were purchased at the cost of many million pounds, and paid for in port stock authorized by the Act. Enough of this elaborate Act has been recited to show that this great port of London is at last administered as a commercial unit, and largely by representatives of the business interests making direct use of its facilities.

A highly centralized and rigid bureaucratic régime has, according to French critics, been largely responsible for the manifest backwardness of the French port system in comparison with the systems of its great commercial neighbors. The justice of this criticism seems to be vindicated by the recent enactment of laws providing for a new régime.

As a contemporaneous expression of the port ambitions of a great industrial state these laws are worth reciting.

A law of January 5, 1912, regulating maritime commercial ports, was promulgated January 10 in the *Journal Officiel*.

The law provides, that after an investigation at the instance of the ministries of public works, commerce and industry and finance, the Council of State may decree that a given port therein delimited shall be governed by an administrative council, whose objectives are strictly controlled by the minister of public works.

A port organized under the law is a public establishment invested with civil personality, and is represented by its president in all judicial proceedings.

The council, whose members serve without pay, but are reimbursed for expenses, decides definitely upon the following objects:

1. Maintenance of the port and its approach.

2. Works for the improvement of the port and its approaches, not involving, without the financial co-operation of the state, an essential modification of existing works.

3. Installation and improvement of such port facilities as cranes, sheds, warehouses, machines for repair work, towage, pilotage; questions relating to the supervision of facilities.

(Chambers of Commerce may, if they wish, continue to administer the services conceded to them.)

4. Questions relating to the supervision of the establishment and operation of wharf railways and eventually the establishment and operation of such railways with reservation of control by the state.

5. Establishment of lighting service, distribution of water, power and light, provided this shall not interfere with municipal service or the light house service.

6. Organization of aid in case of fire as well as in salvaging ships and cargoes; participation in services for the safety, cleanliness, policing and oversight of the wharves and appendages of the port.

7. (Certain powers in regard to temporary local tolls.)

8. Execution of leases for less than eighteen years; realization of loans regularly authorized.

The council's decisions on the above subjects are submitted to the prefect who, if he objects, refers the matter to the proper minister. The minister may annul the decision and this action cannot be appealed to the Council of State on the ground of excess of power or violation of law.

The council's resolutions on the following subject require the sanction of superior authorities.

1. Works involving transformation or essential modification of the facilities of the port and its approach.

2. Works of betterment and extension of the port and its approach, not involving essential modification of existing works, but performed with the financial co-operation of the state.

3. Execution of leases for more than eighteen years, acquisition, alienation or exchange of real estate, loans.

4. Organization and operation of pilotage.

The council is required to give advice on the following subjects:

1. Organization and operation of lighthouse and buoy service, semaphores, customs, sanitary police.

2. Police regulations for the port and approach, measures of municipal police, applicable within the port limits.

3. Establishment and maintenance of ways of communication within the port limits.

4. Establishment or modification of charges of rail-ways or navigable routes serving or touching the port.

In towns having a chamber of commerce, the council consists of fifteen members, and its president is the president of the chamber.

Five members are named by the chamber of commerce of whom three belong, or are eligible to its membership, and two are selected from shipping men, ship-builders, marine brokers, consignors, undertakers of maritime industries or sea captains.

The general council of the department and the municipal council each selects a member from its body.

Of six members named by decree, excluding members of the chamber of commerce, the ministries of public works and of commerce and industry name two each, the ministry of finance one, the sixth member is on the advice of the chamber of commerce, chosen from those connected with one of the land or water transport enterprises serving the port.

A workman of the port shall be elected to membership in the council by his fellows under regulations, thereafter to be made. In this relation the decree of March 10, presently mentioned, prescribes the qualifications of the workmen's representative and the method of election.

The council has the assistance and advice of such officials as the prefect of the department, the chief engineer of the port and the chiefs of the several municipal services. It appoints such employees as are not reserved for ministerial appointment.

The revenue of the council is derived from the wharf charges established by law, and the additional *centimes* duly authorized and from various port charges and taxes including, eventually, receipts from wharf railways.

A decree of May 12, 1912, promulgated May 15 in the *Journal Officiel* establishes the form of preliminary investigation prescribed in the law of January 5, 1912, and a decree of March 10, 1916, promulgated March 15 in the *Journal* describes in detail the port authority contemplated by the law.

Without noting the particulars of these decrees, though they, as well as the original act, should be carefully studied, I would emphasize the fact that the commission of inquiry provided by the former is wholly composed of men interested in the port as shipmasters and business men, and that by the latter, the members of council appointed by the several ministries, must be engineers of prescribed standing and business men presumably familiar with port services.

The above law has not yet, I believe, been actually applied to a French port, and it has been criticised as not going far enough in the direction of self-government. (See *Le Péril de Notre Marine Marchande* by M. J. Charles-Roux, *Revue des Deux Mondes*, July 1, 1917.)

X.

THE "PORT AUTHORITY"

The seaports in the metropolitan territory of the United States are, as we have seen, governed by the several states as the immediate lords of the soil. The states, usually operating through their municipal agencies, are accustomed to regulate the ports in all matters not exclusively of federal concern.

I am of the opinion that this regulation is to a substantial extent permissive, not absolute, and that Congress, in virtue of its power to "regulate commerce among the several states and with foreign nations"—a power here supplemented by federal concern in national defense and in foreign relations generally—may assume an exclusive jurisdiction over seaports in all matters affecting such commerce, thus depriving the states and their agencies of port activities long sanctioned by custom.

In short, I believe Congress has the right to substitute federal for state administration of seaports wherever, and so far as this may be necessary to free these links in our national transportation system from local obstructions.

I find in this federal right a wholesome influence for the prevention and correction of errors and abuses that may arise from selfish and parochial tendencies of local administration and, perhaps, an immediate obligation to assume in this and that respect, actual direction and control. For example I would recommend federal control of quarantine and an open-minded discussion of a federal pilotage system.

Maintaining federal supremacy on principle, valuing it as a corrective of parochialism, commanding its exer-

cise in certain directions, I would, however, oppose displacing local governance of ports by federal governance.

Let none who bespeak a more centralized control of our railway system be lured by a false analogy toward centralization of port control. True, the port is a link in our transportation system by land and sea. True, federal concern needs to be accentuated in certain directions. But the genius of the port is, primarily, local and, in its best estate, spurs the community to offer facilities equaling or surpassing those of rival ports. This spirit of rivalry, which is largely the essence of port improvement, presupposes self governing ports.

Centralizing of port control would be a step backward as foreign experience clearly proves. The United States will not adopt a system never tolerated by England and Germany—a system which France, after hard experience, is beginning to discard.

However, if a centralized administration of our seaports is improper, so is a parochial one. If port functions should not be plucked by Congress from their local settings on the plea that they serve chiefly interstate and international commerce it would be improvident to abandon them to a parochially-minded control.

The true course leads to a single "port authority" representing both local and national interests. A few of our ports are, as we have seen, so far advanced that their bounds are independent of city limits and their governance of city control. But the "port authority" has not yet attained its best estate in this country. Nor will it until state and nation enact complementary enabling laws.

Definite suggestions for such laws will be in order after a thorough study, in which the labors of the New York and New Jersey Port Commission should be help-

ful, but I venture to outline some of the leading features of the desired authority.

The "port" district controlled by the "authority" should be delimited from a commercial, not a political standpoint—that is to say it should embrace all the waters and shores of a harbor, whatever its area and configuration, which may be effectively developed and administered as a commercial unit—overriding, not only municipal divisions but even state boundary lines, such, for instance, as now hamper the usefulness of New York harbor.

The port authority will not regulate any subject of exclusive federal concern such as defensive works, immigration, etc., nor need it extend to works for improving navigation though its relation to federal bodies charged with such functions should be sympathetic.

The province of the port authority is the development, maintenance and regulation of transport facilities of far-reaching concern. Hence its powers and personnel should reflect commensurate breadth of view—co-ordinating federal and state powers in matters where now there is separation, if not discord, and enlisting those business interests which, being at once established in the locality and concerned in world trade will contribute a practical appreciation of both of internal and external conditions not otherwise obtainable.

Considering the personnel as broadly indicating the nature and spirit of the port authority, the federal government should be adequately represented in order to assure an intimate federal conference and co-operation in port affairs, and a constant infusion of national spirit. Of course, the municipality should also be represented.

Passing from the government, to the general personnel, a comparison of port authorities in the United States with those of the best regulated European ports shows an organic difference greatly to our disadvantage.

Our ports are generally administered as a political, rather than a business unit in the sense that the governing body, whether elected or appointed, salaried or unpaid is not, either by law or by custom having the force of law, required to include representatives of the commercial interests centering in the ports.

While in certain communities such representatives are chosen from time to time, the permanence of the practice is not legally assured. On the other hand the authorities administering London, Liverpool, Hamburg, Glasgow and the generality of European ports, largely represent the commercial interests using the port's facilities.

The difference between European and American practice is partly accounted for by the fact that modern Europe has, in regulating business affairs, preserved something of the tradition of the ancient guilds which once gave a commercial complexion to city government. While, generally, the guild has been shorn of its ancient powers, chambers of commerce and kindred bodies enjoy sufficient recognition as public agencies to qualify their members for membership in regulatory bodies of various kinds.

If the guild system was early transplanted in this country it found the soil inhospitable and our commercial associations are not supposed to have reached a degree of stability and public service entitling them to representation in public commissions regulating business affairs.

I am hopeful that the propriety of having business interests directly represented in regulatory bodies will soon be recognized. There is no better place to begin with than the port authority. Then, and then only, shall we be assured that the port will be managed, as primarily, a business, and not a political unit.

Delimit the port district by economic, not political lines; subject port transportation to a single authority representing the public concern of nation, state and city and the private interest of those experienced in both domestic and foreign trade. Such an authority should harmonize the several interests whose misunderstandings and conflicts now impair the efficiency of our ports.

CARMAN F. RANDOLPH.

105 Broadway, New York,

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